Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

JOHN M. PRONTI,

Petitioner,

v.

NEW YORK,

Respondent.

On Petition for a Writ of Certiorari

to the Chemung County Court of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a State intermediate appellate court impervious to reversal after having rendered an unreported decision that is in knowing disregard of a controlling Federal Constitutional decision of this Court?

2. Does an arrested suspect in police custody have a Fifth Amendment right to remain silent in response to incriminating booking demands, i.e. the right to refuse to answer incriminating pedigree questions and to refuse to sign a patently false fingerprint card?

3. Where such refusals take place only after *Miranda* warnings are given, does a State violate a criminal defendant's rights under the Due Process Clause of the Fourteenth Amendment when it repeatedly uses that post-*Miranda* warnings silence as substantive evidence of guilt during its case-in-chief?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of Chemung County Court (App., *infra*, 1a-17a), New York, is unreported; the judgment of Horseheads Village Court (App., *infra*, 18a), New York, is unreported; the certificate denying leave to appeal to the New York Court of Appeals (App., *infra*, 19a) is reported at 7 N.Y.3d 904.

JURISDICTION

The opinion of the Chemung County Court was entered on August 9, 2006. On November 16, 2006, the New York State Court of Appeals denied a timely application for leave to appeal. Jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part:

> No person...shall be compelled in any criminal case to be a witness against himself....

The Fourteenth Amendment provides in part:

> No State shall...deprive any person of life, liberty, or property, without due process of law....

The Privacy Act of 1974, Pub. L. No. 93-579, §7(b), 88 Stat. 1909 (reprinted in annotations to 5 U.S.C. §552a), provides:

> Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

The relevant parts of N.Y. Veh. & Traf. Law §§1192(3), 1193(1)(b) (Consol. 2004), N.Y. Penal Law §§70.15(1), 195.05 (Consol. 2004) are reproduced at App., *infra*, 20a.

STATEMENT

Since 1976, it has been a violation of the Due Process Clause of the Fourteenth Amendment for a State to impeach a criminal defendant through his/her post-*Miranda* warning silence. See *Doyle v. Ohio*, 426 U.S. 610 (1976). This Court later indicated that when the State uses such silence during its case-in-chief, the error is "especially egregious," *Wainwright v. Greenfield*, 474 U.S. 284, 292 n8 (1986), and defined post-*Miranda* silence as "defendant's exercise of his constitutional right[ ] to remain silent...." *Id.* at 295. "With respect to post-*Miranda* warning 'silence,' we point out that silence does not mean only muteness: *it includes the* ***statement*** *of a desire to remain silent*...." *Id.* at n13 (all emphasis added).

A. The Facts

On July 17, 2004, at 11:26 P.M. (A-3), while petitioner was driving on a public street located in the State of New York, a Village of Horseheads police officer pulled him over for having crossed a solid double line. The officer asked him where he was going, and after petitioner said "home" (A-3)[1], requested his driver's license. The driver's license produced listed his address as 2223 Grand Central Ave., Horseheads, New York 14845, but the said address was in the opposite direction of petitioner's line of travel at the time of the stop.

At 11:36 P.M. (A-3), petitioner was arrested for Driving While Intoxicated (N.Y. Veh. & Traf. Law §1192(3) (Consol. 2004) (see App., *infra*, 20a)): i.e. a misdemeanor punishable by up to one year in jail. (N.Y. Veh. & Traf. Law §1193(1)(b) (Consol. 2004) (see App., *infra*, 20a)). The arresting officer, Officer Patterson, gave *Miranda* warnings at that time (A-662), and it remains undisputed that petitioner immediately "advised the arresting officer that he chose to exercise [ ] his right[ ] to remain silent." (A-73, ¶77).

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[1] Petitioner cites the record as (A-#), where # is the page number of the Appendix submitted to the Chemung County Court on the appeal below.

The arresting officer brought petitioner to the Horseheads police station, and at 1:05 A.M. on July 18, 2004, that officer received, from the New York State Division of Criminal Justice Services, a faxed printout that verified petitioner's address as being the same one listed on his driver's license, and which disclosed his social security number. (A-12; A-13). Petitioner knew this at 1:05 A.M., but fifteen minutes later at 1:20 A.M., the officer still asked petitioner to provide his address and social security number. (A-666-667).

Petitioner, a recent law school graduate, knew that if he orally confirmed his address as being the same one listed on both his driver's license and the faxed printout, he would be admitting to having lied, at the time of the stop, about driving home; and he knew that the State could use that admission against him at trial. Petitioner also knew that if he revealed his current inability to recall his social security number, the State could use that admission to prove intoxication. Finally, and because petitioner was aware of the fact that the officer had already verified both his address and social security number, and since he knew that the officer was violating the Federal Privacy Act in every respect, he believed that the officer was only asking those questions to incriminate him. See The Privacy Act of 1974, Pub. L. No. 93-579, §7(b), 88 Stat. 1909 (reprinted in annotations to 5 U.S.C. §552a) ("Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.")

Thus, petitioner reasserted his Fifth Amendment "right to remain silent, to *refuse* to answer *any* questions," as that right was previously told to him by the arresting officer (A-662); and in so "*refusing*" (A-667) to answer the two incriminating pedigree questions asked, relied on the arresting officer's implicit *Miranda* warning promise that his silence would not be used against him. (U.S. Const. amends. V, XIV).

Thereafter, the arresting officer told this petitioner that he wanted to fingerprint him. Petitioner orally refused, and when the arresting officer took him into another room to have him sign a blank fingerprint card, petitioner saw the words "SIGNATURE OF PERSON FINGERPRINT**ED**" appearing in the same box that the officer now wanted him to sign. (A-19; A-22) (all emphasis added). Since the officer had not yet taken his fingerprints, petitioner believed that his signature, if given, would result in an incriminating false representation that the State might later use against him at trial. Thus, he refused to sign the false fingerprint card. When the officer responded with force in an effort to make him sign, petitioner placed his hands in his pockets and refused to remove them.

Based primarily upon petitioner's refusals to waive his privilege against self-incrimination, the officer charged him with Obstructing Governmental Administration in the Second Degree, i.e. another misdemeanor punishable by up to a year in jail. (N.Y. Penal Law §§ 195.05; 70.15(1)) (Consol. 2004) (see App., *infra*, 20a). Indeed, the criminal information had somehow charged this petitioner with having refused to incriminate himself. "John M. Pronti...did repeatedly *refuse* to render any personal information pertaining to his *current living address*, *social security number*, *refuse to sign his fingerprint cards* and did also refuse to allow your deponent to fingerprint him by placing both hands in his pants pocket and refuse to remove them while verbally stating he would not be fingerprinted...." (A-302) (emphasis added).

Therefore, it becomes readily apparent that the arresting officer in this case had fully expected the trial court to allow the jury to convict your petitioner for having dared to invoke his Fifth Amendment right to remain silent. Indeed, the prosecutor told the trial court, during petitioner's trial, that he himself harbored such an expectation. (A-681-683). As it would turn out, both the arresting officer and prosecutor were right: the State was to convict your petitioner of both crimes by using his post-*Miranda* warning silence against him.

B. The trial

The arresting officer told the jury that he gave petitioner certain *Miranda* warning upon arrest (A-660-661), to wit:

> You have the right to remain silent, to ***refuse*** to answer any questions. Anything you do say, may be used against you in a court of law. You have a right to stop answering my questions at any time you desire. You have the right to a lawyer before speaking to me, to remain silent and to stop answering questions. If you desire a lawyer but you cannot afford one, one will be provided to you without cost. Do you understand each of these rights as I have instructed you.

(A-662) (all emphasis added).

Since the trial Court deemed defense counsel's pre-trial objection to the use of petitioner's post-*Miranda* warning silence (A-476-480) a "real twist" (A-480), the prosecutor, acting with utmost bravado, gave this opening statement:

> The defendant ***refused*** to give his address, social security number, [and] ***refused*** to sign the fingerprint card....You'll hear what he says in terms of ***refusing*** to provide that information.

(A-577-578) (all emphasis added).

During the State's case-in-chief, the arresting officer then testified about petitioner's post-*Miranda* warning silence:

> Q: Are there certain things you need to have in order to properly process the defendant, certain pieces of that information?
>
> A: Yes, sir. We need the address, Social Security number, the top one is name, date of birth.
>
> Q: Okay. Did Mr. Pronti provide that information to you?

A: He was ***refusing*** to give me any information other than his name and date of birth.

(A-666-667) (all emphasis added).

Defense counsel, citing "federal constitutional rights" (A-667), the "Fifth Amendment" (A-677; A-678), and "federal law" (A-679), timely objected to the use of petitioner's "post-Miranda silence." (A-667; A-671 (twice); A-686 (twice)).

The Court, noting that the objection had also meant to cover petitioner's refusals to sign a fingerprint card (A-684-685; A-689), overruled it, and allowed the officer to testify:

Q: Now while you were processing the defendant at the police station, did you have an opportunity to ask him certain questions regarding information you needed for the booking process?

A: Yes, sir.

Q: And did he provide you with that information?

A: No, sir.

Q: What was the information that you asked for?

A: I had asked for his address, which was ***refused*** to be given. I think I had to ask for his phone number, he also had ***refused*** to give me that.

(A-776-777) (all emphasis added).

Q: Can you tell the jury what happened [when you tried to fingerprint him]?

A: At that point in time I had removed Mr. Pronti from the wall, we go into the interview room where...I tell him I need you to sign the fingerprint cards, [Mr. Pronti] ***refused*** to sign the fingerprint cards."

(A-778-779) (all emphasis added).

The defense had previously made it abundantly clear that "we're objecting to the video as well because we're again talking about post-Miranda silence." (A-690; see A-691).

The court overruled that objection too, and on redirect examination of the arresting officer, allowed the State to play an audio/visual videotape (A-870) to the jury containing the following exchange between this petitioner and that officer:

Officer: [Inaudible question]

Petitioner: I won't give that.

Officer: May I ask you why you won't give that? Why, why wouldn't you want to give that to us, just because?

Petitioner: It's bull shit.

Officer: What's bull shit?

Petitioner: This.

Officer: You think this is? The fact that you…

Petitioner: The fact that I'm handcuffed.

Officer: The fact that you're driving around drunk?

Petitioner: You won't piss me off.

Officer: I'm not trying to piss you off…

Petitioner: I'm not drunk…

Officer: …and you won't piss me off.

Petitioner: …I'm not drunk

Officer: Okay, well, you have, you're in a situation, Okay? I've got something to do. If you want to get out of here, just answer my questions and you're gone, Okay?

Petitioner: I've learned that I don't have to answer your questions.

Officer: You don't have to tell me where you live, you're social security number or anything like that?

Petitioner: Nope, nothing like that.

Officer: Okay. That's probably why you failed the Bar [Examination].

....

Officer: Are you still living over on Grand Central Avenue?

Petitioner: I won't answer that.

....

Officer: Okay, sign the fingerprint card right here, Okay?

Petitioner: Nope, I'm not doing it.

Officer: You need to sign right here.

Petitioner: You're going to have to kick my ass because I'm not doing it.

Officer: Get your hands out of your pockets.

Petitioner: Nope. Do what you gotta do. I'm disabled. Fuckin' hurt me, I don't care.

Officer: Take your hands out of your pockets.

Petitioner: Nope.

Officer: Take your hands out of your pockets.

Petitioner: Nope. Do what you gotta do. Fuckin' hurt me.

Officer: Okay.

[Sound of officer striking petitioner's skull on metal]

Officer: Take your hands out of your pockets.

Petitioner: Nope, nope. Are you gonna hurt me man?

Officer: No.

Petitioner: I'm disabled, are you fuckin' hurting me, man?

Officer: I'm not hurting you.

Petitioner: That would be great.

Officer: Am I hurting you?

Petitioner: You're not fucking...

Officer: Stop resisting.

Petitioner: I'm not resisting.

Officer: I just want your hands out of your pockets.

Petitioner: I'm not doing it.

Officer: I just want them out.

Petitioner: There.

Officer: Was that so hard child?

Petitioner: They're both here.

Officer: Was that so hard child?

...

Officer: Okay. So you're ***refusing*** everything. You're not going to ***sign*** [the false fingerprint card]...

Petitioner: I'm ***refusing***. I gave you my name -- I gave you everything I got to give you.

(Trial Exhibit "12").

Petitioner did not testify after the State rested. Petitioner knew that the trial court had improperly permitted the State to make evidentiary use of his post-*Miranda* warning silence.

The State also knew, throughout the entire trial, that it was improperly using petitioner's post-*Miranda* warning silence, and thus at the very beginning of the jury charge

conference, it successfully moved to amend the information so as to eliminate all references to petitioner's refusals to provide his (1) address, (2) social security number, and (3) signature on the fingerprint card. (A-903-908).

The State, however, during trial summations, had to use this petitioner's post-*Miranda* warning silence one last time:

> [Y]ou see on the videotape a very angry Mr. Pronti, a very belligerent Mr. Pronti. And that action, that belligerence is evidence of intoxication. You heard the witnesses say that can be and you know from your own personal experience that that can be evidence of intoxication. He was mad. And he wasn't acting the way you would normally act in a situation where there are officials in official capacity. *I mean he was in an argument with the officer about what he had to provide and what he didn't have to provide.* ***That, those actions, those actions at the police station tell the tale. They show that he is intoxicated.***

(A-959-960).

Thus, the State told the jury that only an intoxicated person would have invoked his Fifth Amendment right. The State also implied that since the petitioner had invoked his right to remain silent by refusing to answer the pedigree questions, and by refusing to sign the fingerprint card, he had necessarily placed his hands in his pockets and refused to remove them in order to prevent his fingerprinting. See *In re Davan L.*, 91 N.Y.2d 88, 91 (1997) (Under New York law, "physical force or interference" is an essential element of the crime of Obstructing Governmental Administration.); N.Y. Penal Law §195.05 (Consol. 2004) (see App., *infra*, 20a).

The jury convicted your petitioner, with no prior criminal record, for the two crimes of Driving While Intoxicated and Obstructing Governmental Administration. The trial court sentenced petitioner to fines and ninety days incarceration.

C. The appeal

Petitioner appealed to the Chemung County Court, an intermediate appellate court of the State of New York.

County Court found that petitioner "***refused*** to sign the blank fingerprint cards" (App., *infra*, 2a), and citing to the videotape (Trial Exhibit "12"), that he "***refused***" to answer the two pedigree questions "and instead cursed repeatedly." (App., *infra*, 11a) (all emphasis added). Recognizing that petitioner "terms this conduct 'silence'" (*Ibid.*), and that he "argues that evidence of his silence is response to properly posed routine booking questions was not admissible" (*Id.* at 12a), County Court found the question as to whether such silence violates the Federal Constitution unsettled:

> Illinois v. Lackland, 248 Ill. App.3d 426, 434 held that where an already Mirandized defendant remained silent in the face of routine pedigree questioning, such silence was inadmissible. In citing to Doyle v. Ohio, 426 U.S. 610, the court in Lackland implicitly reasoned that a defendant might otherwise be lulled by the Miranda warnings into conduct later determined to be incriminating. Contrary to Lackland, the Appellate Division of the First Department of New York State, in People v. Johnson, 253 A.D.2d 702, 703 held that evidence of a refusal to answer questions which fall within the pedigree exception is admissible because the questioning does not violate the defendant's constitutional rights.

(App., *infra*, 12a-13a).

Through the above quoted language, however, County Court had noted the distinguishing factor between *Lackland* and *Johnson*: only the *Lackland* defendant received *Miranda* warnings prior to the refusal to answer pedigree questions.

Although County Court did not deny that this petitioner had received *Miranda* warnings before his refusals to answer

the two incriminating pedigree questions (and before refusing to sign the false card), it distinguished *Lackland* on the sole basis that this petitioner was not silent. (App., *infra*, 13a).

> Therefore, while evidence of silence in response to pedigree questioning may be inadmissible under Miranda, evidence of swearing and other uncooperative conduct in response to the same questions is admissible. *As a result, there was no error in the trial court's admission of evidence of defendant's statements and behavior at the police station.*

(*Ibid.*) (emphasis added).

County Court, having relied on *Lackland*, had clearly rejected petitioner's "constitutional error" (*Id.* at 11a) claim on federal grounds alone. "Under *Doyle*, defendant's due process rights were violated...." *People v. Lackland*, 248 Ill. App.3d 426, 435 (Ill. App. Ct. 1993).

In his Appellate Brief, petitioner also raised the following argument that County Court ultimately rejected on its merits:

> Nonetheless, and to make his invocation of the right even more unequivocal, the defendant later refused to sign a blank fingerprint card. (A-838-839). The Defendant refused only after the officer had attempted to physically coerce him into signing the blank fingerprint card which, if executed while containing no fingerprints, would have resulted in Defendant's false attestation to his "SIGNATURE OF PERSON FINGERPRINT**ED**." (A-19; A-22)(all emphasis added). This Defendant, recognizing the possibility that the Officer could thereafter place false information or another's prints on it, refused, relying on his Fifth Amendment protection from "any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to

other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972).

....

Indeed, the "Fifth Amendment...privilege protects a person only against being incriminated by his own compelled testimonial communications." Fisher v. United States, 425 U.S. 391, 409 (1976). Unlike the situation presented in Doe, supra; where, as here, the police seek "a signature on an incriminating statement—then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination." United States v. Marasovich, 410 U.S. 19, 22 (FN)(1973). Thus it becomes conclusive that defendant's "refusal to sign...was in these circumstances an effective assertion of his Fifth Amendment privilege." Lefkowitz v. Cunningham, 431 U.S. 801, 804 (1977).

The instant defendant refused to waive his privilege against self-incrimination, and as a direct result was charged with Obstructing Governmental Administration. Indeed, it was incredibly alleged that this Defendant had somehow committed the crime by engaging in six different acts or omissions. The Defendant "did repeatedly refuse to render any personal information pertaining to his [1] **current living address**, [2] **social security number**, [3] **refuse to sign his fingerprint cards** and did also [4] refuse to allow your deponent to fingerprint him [5] **by placing both hands in his pants pocket and refuse to remove them** [6] while verbally stating he would not be fingerprinted...." (A-302).

....

Just as this Defendant's refusal to sign the false fingerprint card under physical compulsion was inadmissible as consciousness of guilt, his post-arrest

> booking silence was also improper as evidence of that kind; because "**every** post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." Doyle v. Ohio, supra, 426 U.S. at 617 (all emphasis added). Since the People here had maliciously utilized all of that inadmissible evidence as their case in chief, under Doyle v. Ohio, this Defendant's precious right to due process of law was egregiously violated.

(Appellate Brief, pp. 21-22, 22-23, 30) (ellipses between paragraphs added) (all alterations, emphasis, and other ellipses in original).

Indubitably, County Court concluded: "The court has *considered* defendant's other arguments and finds them to be without *merit*." (App., *infra*, 17a) (emphasis added). Thus, the Court below had rejected the merits of petitioner's *Doyle* error claim, i.e. that the trial court had improperly permitted the State, during its case-in-chief, to make evidentiary use of (1) his refusals to answer the two pedigree questions asked, and (2) his refusals to sign the patently false fingerprint card. See *Goosby v. Osser*, 409 U.S. 512, 522 n8 (1973).

Since County Court had "considered," on its "merit," petitioner's *Doyle* error claim, this Court has jurisdiction to review that federal issue. See *Wainwright v. Greenfield*, 474 U.S. 284, 288 (1986) (Where, as here, a state intermediate appellate court has rejected the "merits" of a *Doyle* error claim, this Court has jurisdiction); *Id.* at 289 n3; see also *Orr v. Orr*, 440 U.S. 268, 274, 274 n4 (1979) (Even where a state court reaches the merits of an unpreserved federal question, this Court has jurisdiction.); *Castaneda v. Partida*, 430 U.S. 482, 486 n. 4 (1977) (Where a State court has "considered" a federal claim on its "merits," this Court has jurisdiction.); *Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (Where a State Court uses its discretion to decide a "constitutional claim on the merits," this Court has jurisdiction.)

REASONS FOR GRANTING THE PETITION

I. THE CHEMUNG COUNTY COURT OF NEW YORK HAD KNOWINGLY DISREGARDED THIS COURT'S FEDERAL CONSTITUTIONAL DECISION IN *WAINWRIGHT V. GREENFIELD.*

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the police arrested two people for selling marijuana. After receiving *Miranda* warnings, neither one of them made any statements regarding their involvement in the crime. At separate trials, however, both defendants testified that a government informant had framed them. On cross-examination by the prosecution, both were repeatedly asked why, if truly innocent, they did not offer their trial explanation to the police when arrested. *Id.* at 613-615, 614 n.5. Although defense counsel timely objected to the questioning at both trials, they were overruled, *Id.* at 614; and again, over timely objection at both trials, the prosecutor, during closing arguments, argued petitioners' post-*Miranda* warning silence to the jury. *Id.* at 614 n.5. On direct review, this Court noted that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warning." *Id.* at 618. On that basis, this Court felt it to be "fundamentally unfair" for the State Court to have allowed the prosecutor to use the two suspects' post-*Miranda* warning silence for purposes of impeaching their trial testimony. *Ibid.* "We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.

In *Wainwright v. Greenfield*, 474 U.S. 284 (1986), this Court held that the following portion of the State of Florida's summation, which was used to show the defendant's sanity at the time of the charged sexual battery, violated "the Due Process Clause of the Fourteenth Amendment as construed in *Doyle v. Ohio*, 426 U.S. 610 (1976)." *Id.* at 285.

"He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down -- as going down [to] the car as you recollect Officer [Pilifant] said he explained what Miranda rights meant and the guy said -- and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley -- He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant....

....

"So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity."

Id. at 287 n2 (alterations and ellipses in original).

After observing that the above summation had described "defendant's exercise of his constitutional rights to remain silent and to consult counsel," *Id.* at 295, this Court defined post-*Miranda* warning silence as including all words used by a suspect in invoking those two rights. "With respect to post-*Miranda* warning 'silence,' we point out that *silence does not mean only muteness*: it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.* at 295 n13 (emphasis added). Since that definition was wholly necessary to this

Court's holding that the State had violated defendant's due process rights through its "use" of his statements, i.e. his "post-*Miranda* warnings silence as evidence of his sanity," *Id.* at 295, the said definition did not constitute *obiter dictum.*

Indeed, and despite concurring in the result reached, two members of this Court had clearly relayed their disagreement with the majority who, like the Court of Appeals, believed "that respondent's conduct and statements following the warnings, such as his requests for a lawyer, should be treated the same as *silence.*" *Id.* at 297 (REHNQUIST, J., concurring, joined by BURGER, C.J.) (emphasis in original). Finding that the defendant "did *not* remain silent," *Id.* at 300 (emphasis in original), those two Justices opined that only a "much smaller portion" of that summation had truly violated his Fourteenth Amendment Due Process rights. *Id.* at 301.

It is undisputed that upon receiving *Miranda* warnings, this petitioner "advised the arresting officer that he chose to exercise [ ] his right[ ] to remain silent." (A-73, ¶77). Later at the police station, the officer then asked this petitioner the two incriminating pedigree questions; and demanded that he sign the false fingerprint card. According to five-members of this Court, that pedigree questioning constituted "custodial interrogation" *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (BRENNAN, J., plurality, joined by O'CONNOR, SCALIA, and KENNEDY, JJ.); See also *Id.* at 608-612 (MARSHALL, J., concurring in part and dissenting in part), as did the officer's demands to sign the false fingerprint card.

On appeal, County Court found that petitioner "***refused*** to sign the blank fingerprint cards" (App., *infra*, 2a), and that "the videotape of the defendant taken at the police department on the night of his arrest indicates that when he was asked routing [sic] pedigree questions, he ***refused*** to answer them and instead cursed repeatedly." (*Id.* at 11a) (all emphasis added). Based upon these findings alone, petitioner here had clearly "invoked his Fifth Amendment privilege in ***refusing*** to answer further questions," *United States v.*

Helstoski, 442 U.S. 477, 482 (1979) (all emphasis added), and did so despite only pedigree questions being asked. See *United States v. Montana*, 958 F.2d 516, 518 (2d Cir. 1992) (One who "refuses" to answer pedigree questions is invoking his Fifth Amendment right to remain silent.) Likewise, and since the officer had used physical force in an effort to make him sign a false fingerprint card, this petitioner's "***refusal*** to sign...was in these circumstances an effective assertion of his Fifth Amendment privilege." *Lefkowitz v. Cunningham*, 431 U.S. 801, 804 n3 (1977) (all emphasis added).

The fact that the petitioner had used statements/swearing to invoke his Fifth Amendment right to remain silent was, and despite County Court's contrary ruling, irrelevant. "If the individual indicates in *any* manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. *At this point he has shown that he intends to exercise his Fifth Amendment privilege....*" *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966) (footnote omitted) (emphasis added). Indeed, and "[a]lthough *Miranda's* requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed," *Roberts v. United States*, 445 U.S. 552, 560 (1980), this petitioner was still constitutionally entitled to use "*any* language that a [police officer] may reasonably be expected to understand as an attempt to invoke the privilege." *Quinn v. United States*, 349 U.S. 155, 163 (1955) (emphasis added).

Thus, petitioner had justifiably used statements/swearing to relay his post-*Miranda* warning refusals to answer the two incriminating pedigree questions asked; and had justifiably used the same means to relay his post-*Miranda* warning refusals to sign the false fingerprint card. Indeed, the audio portion of the videotape clearly records the arresting officer acknowledging his understanding of the fact that all of this petitioner's statements/swearing were invocations of his Fifth Amendment right to remain silent: "Okay. That's probably why you failed the Bar [Examination]." (Trial Exhibit "12").

Nonetheless, County Court found that "defendant was not silent, and the prosecution did not indicate that he was silent" (App., *infra*, 13a); and held that his "swearing and other uncooperative conduct in response to the same questions is admissible." (*Ibid.*). The Court ruled so after having noted that "defendant terms this conduct 'silence'" (*Id.* at 11a), and despite the fact that petitioner was right. "With respect to post-*Miranda* warning 'silence,' we point out that *silence does not mean only muteness*: ***it includes the statement of a desire to remain silent***...." *Greenfield*, 474 U.S. at 295 n13 (all emphasis added); see also *Miranda*, 384 U.S. at 468 n 37 ("In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute* ***or*** *claimed his privilege*....") (all emphasis added). Indeed, the above definition of post-*Miranda* warning silence had clearly rendered all of this petitioner's challenged statements (see, *supra*, at pp. 7-9) inadmissible.

Equally inadmissible were the previously quoted portions of the State's opening statements, the arresting officer's direct testimony, and the State's summation. (see, *supra*, at pp. 5-6, 10). "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." *Greenfield*, 474 U.S. at 295.

Thus with the sole exception of the Chemung County Court, this Court's decision in *Wainwright v. Greenfield* has been properly followed by all lower courts. See, e.g., *United States v. Bushyhead*, 270 F.3d 905, 913 (9th Cir. 2001) ("Just as a prosecutor at trial cannot use the fact of defendant's post-Miranda silence, he also cannot use a statement such as 'I'm not going to say anything,'...."); *Kappos v. Hanks*, 54 F.3d 365, 369 (7th Cir. 1995) ("A voiced refusal to cooperate or acts indicating such a refusal are the equivalent of invoking the right of silence, and prosecutors may not

comment on them...."); *Fields v. Leapley*, 30 F.3d 986, 990 (8th Cir. 1994) ("'I ain't saying nothing'" is "'silence' for purposes of Doyle."); *United States v. Szymaniak*, 934 F.2d 434, 439 (2d Cir. 1991) (Under *Doyle*, "statements of a suspect's intent to remain silent are inadmissible.")

After all, and within his reply brief, this petitioner had expressly relied on *Wainwright v. Greenfield* in support of his *Doyle* error claim (Appellant's Reply Brief, p. 5-7); and that case, other than *Doyle* itself, was the only decision of this Court cited therein. Since County Court had ruled that no *Doyle* error existed due to petitioner's use of statements and swearing to convey his desire to remain silent, the Court below had knowingly disregarded *Wainwright v. Greenfield*, i.e. the controlling constitutional decision of this Court.

"But it is [ ] well settled that a right claimed under the Federal Constitution, finally adjudicated in the Federal Courts, can never be taken away or impaired by state decisions." *Deposit Bank v. Frankfort*, 191 U.S. 499, 517 (1903). Although the Chemung County Court does not agree with that view, whenever a state court decision so conflicts with a prior constitutional decision of this Court, *certiorari* to review that lower court decision becomes proper, see *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981), including where, as here, the Due Process Clause of the Fourteenth Amendment is at issue. See, e.g., *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-372 (1974). In addition, and since the Court below had knowingly disregarded *Wainwright v. Greenfield*, i.e. the controlling constitutional decision of this Court, a writ of *certiorari* here becomes necessary: "We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court." *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984).

The time is ripe for this Court to re-admonish all lower courts that it will not tolerate such a knowing disregard of its controlling constitutional decisions. On that basis alone, this Court should grant the instant petition for *certiorari*.

II. THIS CASE PRESENTS IMPORTANT ISSUES REGARDING WHETHER A SUSPECT ENJOYS AN ABSOLUTE FIFTH AMENDMENT RIGHT TO REFUSE TO ANSWER INCRIMINATING PEDIGREE QUESTIONS, AND TO REFUSE TO SIGN A FALSE FINGERPRINT CARD, WHILE IN POLICE CUSTODY; AND, EITHER WAY, WHETHER *DOYLE V. OHIO* FORBIDS THE STATE FROM USING SUCH POST-*MIRANDA* WARNING REFUSALS AS TRIAL EVIDENCE.

Petitioner is unable to locate a single case purporting to rule that a State, and despite *Doyle*, can make evidentiary use of a defendant's post-*Miranda* warning refusal to answer incriminating pedigree questions: or make such use of a post-*Miranda* warning refusal to sign a false fingerprint card.

According to statistical compilation, the approximate number of total arrests made in the United States in 1999 was 14,363,600; in 2000, there were about 13,986,000; in 2001, roughly 13,703,200; in 2002, there were around 13,750,300; the year 2003 brought an estimated 13,646,600; and finally, in 2004, something like 13,941,600 arrests were made. See *Puzzanchera, C., Adams, B., Snyder, H., and Kang, W. (2006). "Easy Access to FBI Arrest Statistics 1994-2004" Online. Available: http://ojjdp.ncjrs.gov/ojstatbb/ezaucr/.*

Since the police ask most, if not all, arrestees in this country pedigree questions, and seek to have them sign the F.B.I. fingerprint card here at issue (A-19), the above statistics indicate the national importance of these two issues.

Although there are no conflicting decisions on either issue, the Court below had rejected a "substantial" claim of a violation of the Due Process Clause of the Fourteenth Amendment, and thus *certiorari* here is proper. *Williams v. Kaiser*, 323 U.S. 471, 473 (1945); See *Tompkins v. Missouri*, 323 U.S. 485, 486 (1945) (companion case); See also *Reynolds v. Cochran*, 365 U.S. 525, 527 (1961).

A. SUSPECTS HAVE A FIFTH AMENDMENT RIGHT TO REFUSE TO ANSWER ANY INCRIMINATING PEDIGREE QUESTIONS, AND TO REFUSE TO SIGN ANY FALSE FINGERPRINT CARDS.

"To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004).

Here, and as to the address and social security number questions, had petitioner truthfully responded "my address is 2223 Grand Central Avenue, Horseheads, N.Y. 14845," and "I do not recall my social security number," both answers would have been testimonial. See *Pennsylvania v. Muniz*, 496 U.S. 582, 612 (1990) (MARSHALL, J., concurring in part and dissenting in part). Indeed, the word "testimonial" includes all such statements used to "convey information or assert facts." *Doe v. United States*, 487 U.S. 201, 213 (1988).

Since the two pedigree questions constituted "custodial interrogation" *Muniz*, 496 U.S. at 601 (BRENNAN, J., plurality, joined by O'CONNOR, SCALIA, and KENNEDY, JJ.); See also *Id.* at 608-612 (MARSHALL, J., concurring in part and dissenting in part), compulsion was also present. See *Miranda v. Arizona*, 384 U.S. 436, 460-461 (1966).

As to the incriminating nature of both pedigree questions asked, when the arresting officer first made the traffic stop, petitioner said he was driving "home" (A-3); yet minutes later he produced a driver's license listing his address as 2223 Grand Central Ave., Horseheads, New York 14845, i.e. in the opposite direction. The officer then arrested petitioner for Driving While Intoxicated, and at 1:05 A.M. the next morning, received, from the New York State Division of Criminal Justice Services, a facsimile verifying petitioner's above address, and revealing his social security number. (A-12; A-13). Petitioner knew all this at 1:05 A.M., but fifteen

minutes later at 1:20 A.M., the officer still demanded that he provide that same information. (A-666-667). Petitioner therefore harbored "a reasonable belief that the disclosure[s] would tend to incriminate him." *Hiibel*, 542 U.S. at 191.

Indeed, petitioner reasonably believed that if he admitted that his driver's license address was still correct, he would be admitting to having previously lied, at the time of the stop, about his destination; and that New York would later use that admission against him at trial. See, e.g., *People v. Rivera*, 26 N.Y.2d 304, 309 (1970) (The People used defendant's time-of-arrest address statement at trial to discredit him and/or as consciousness of guilt.); see also *Muniz*, 496 U.S. at 597 n10 (false statements made at the time of arrest are admissible as consciousness of guilt). Petitioner also reasonably believed that to do so would give the arresting officer an excuse to claim at trial that, due to alleged intoxication, his "mental state was confused" to the point that he did not even know the direction he was going. *Muniz*, 496 U.S. at 592.

Of course, the State proved petitioner's beliefs reasonable when it gave written arraignment notice of its intent to use his driving "home" statement at trial for that charge. (A-3).

Likewise, petitioner reasonably believed that because the arresting officer already had his social security number, he was only asking for it to see if petitioner was able to recall it from memory. See *Muniz*, 496 U.S. at 599 n13. Given that petitioner could not, he reasonably believed that to admit this would result in further incriminating evidence that the State might later use against him at trial to show intoxication. See *id.* at 599 (Where a driving while intoxicated arrestee does not then know the answer to a simple question asked, i.e. a situation that a lucid person would not be expected to be in, the Fifth Amendment right to remain silent exists.); *id.* at 612 (MARSHALL, J., concurring in part and dissenting in part).

In addition, and since petitioner knew that the arresting officer was demanding his social security number in violation of the Federal Privacy Act, which the officer later admitted to

at trial (A-810), this only added to his reasonable belief that the officer was simply trying to incriminate him. See The Privacy Act of 1974, Pub. L. No. 93-579, §7(b), 88 Stat. 1909 (reprinted in annotations to 5 U.S.C. §552a) ("Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.")

Finally, and since the officer already had this petitioner's address and social security number, petitioner reasonably believed that the officer, without any administrative need for the information, was only trying to incriminate him. See *Muniz*, 496 U.S. at 611 n1 (MARSHALL, J., concurring in part and dissenting in part) (After the police get the pedigree information sought, to still ask for it "suggests that the question was designed to obtain an incriminating response.")

The State later confirmed the reasonableness of even that belief when, during opening statements (A-578), it admitted that the pedigree questioning was primarily videotaped to incriminate this petitioner. See *Muniz*, 496 U.S. at 611 (MARSHALL, J., concurring in part and dissenting in part) (If pedigree questioning is videotaped, this "strongly implies a purpose to the interrogation other than 'recordkeeping.'")

Since County Court agreed that petitioner's truthful answers would have been incriminating (App., *infra*, 14a), this petitioner had a Fifth Amendment right to remain silent. "'Without obtaining a ***waiver*** of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminating admissions.'" *Muniz*, 496 U.S. at 602 n 14 (BRENNAN, J., plurality, joined by O'CONNOR, SCALIA, and KENNEDY, JJ.) (quoting Brief for United States as Amicus Curiae 13) (all emphasis added).

As to the fingerprint card, in *Doe*, supra, this Court held that the Fifth Amendment was inapplicable to one compelled to sign a consent directive. The Court noted that the Fifth

Amendment protects only against compelled testimonial information, and that "[i]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe*, 487 U.S. at 210 (footnote omitted).

Here, however, the officer had tried to force petitioner to sign a blank fingerprint card (A-816-817; 838-839) under the words "SIGNATURE OF PERSON FINGERPRINT**ED**" (A-19; A-22) (all emphasis added). Had this petitioner signed beneath those false words, "the content of the writing would have reflected his assertion of facts or beliefs and hence would have been testimonial...." *Muniz*, 496 U.S. at 598.

As to the requisite showing of compulsion, petitioner was in police custody, and thus the videotape of the arresting officer's relentless efforts to get him to sign a patently false fingerprint card satisfies that issue. (See, *supra*, at pp. 8-9).

Finally, the State, before trial, twice admitted that the officer only wanted this petitioner's signature on the false card to incriminate him. (A-384, ¶20; A-328). Yet where the police seek "a signature on an incriminating statement -- then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination." *United States v. Mara*, 410 U.S. 19, 22 FN (1973). For that reason, this petitioner's "refusal to sign...was in these circumstances an effective assertion of his Fifth Amendment privilege." *Lefkowitz v. Cunningham*, 431 U.S. 801, 804 n3 (1977).

It thus becomes conclusive that all suspects in police custody have the right to refuse to answer incriminating pedigree questions, and to refuse to sign false fingerprint cards: the Fifth Amendment "has always been 'as broad as the mischief against which it seeks to guard.'" *Miranda*, 384 U.S. at 459-460 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). Indeed, no purported governmental need can ever trump a U.S. citizen's absolute Fifth Amendment right to remain silent. See *Lefkowitz*, 431 U.S. at 808.

B. THOUGH ALL LOWER COURTS AGREE THAT *DOYLE V. OHIO* FORBIDS A STATE FROM MAKING EVIDENTIARY USE OF A SUSPECT'S POST-*MIRANDA* WARNING PEDIGREE QUESTIONING SILENCE, THIS COURT SHOULD NOW RESOLVE THAT VERY IMPORTANT ISSUE.

At trial, the State argued that since *Miranda* warnings are not usually required before the police begin asking pedigree questions (A-688), the Federal Constitution could not protect this petitioner's refusals to answer two such questions.

Defense counsel's trial argument, however, was that:

> The constitutional right is to remain silent. He was advised of that specifically, to waive that he had to do so knowingly, intelligently and voluntarily. How can anybody do that, you have a right to remain silent and stop answering questions at any time, *it doesn't say except for pedigree information.*

(A-674)

The trial court espoused the State's remarkable position, but it was only defense counsel's argument that had found any support in *Doyle v. Ohio*:

> Although the government argues that there was no *Doyle* violation because a pedigree question does not require Miranda warnings, the warning given to [John Pronti] apparently did not inform him that he had no right to refuse to answer pedigree questions, and he might well have believed he had that right; thus the [State's] description of [John Pronti's] initial refusal and overall reluctance...was improper.

United States v. Garcia, 1997 U.S. App. LEXIS 8092, *16 (2d Cir. 1997), cert. den. 522 U.S. 880 (1997), and cert. den. 523 U.S. 1034 (1998) (citing *Doyle v. Ohio*, 426 U.S. 610).

> The State argues that under *Pennsylvania v. Muniz* (1990), 496 U.S. 582, 110 L.Ed.2d 528, 110 S.Ct. 2638, the questions concerning the above matters fall within the routine booking exception to *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602. Muniz is distinguishable from the case at bar in two significant respects. First, the defendant in Muniz was *not* advised of his Miranda rights prior to being asked 'routine booking' questions. *Here, defendant was advised of his rights prior to being questioned.* Second, the State in Muniz was attempting to admit answers the defendant gave to police regarding routine booking information. *In the case at bar, the State commented on defendant's silence as being evidence of guilt, not on any substantive answers as in Muniz*....Under *Doyle*, defendant's due process rights were violated by the State's comments in closing argument that defendant's silence after receiving the Miranda warnings was "consciousness of guilt."

People v. Lackland, 248 Ill. App.3d 426, 434-435 (Ill. App. Ct. 1993) (emphasis added).

County Court nonetheless held that "while evidence of silence in response to pedigree questioning may be inadmissible under Miranda, evidence of swearing and other uncooperative conduct in response to the same questions is admissible." (App., *infra*, 13a). However, *Wainwright v. Greenfield*, 474 U.S. 284 (1986) had required (see, *supra*, at pp. 15-20) that this petitioner's "voiced *refusal* to *cooperate* or acts indicating such a refusal are the equivalent of invoking the right of silence, and prosecutors may not comment on them...." *Kappos v. Hanks*, 54 F.3d 365, 369 (7th Cir. 1995) (emphasis added). New York State had improperly used petitioner's post-*Miranda* warning pedigree questioning silence to prove, *inter alia*, alleged intoxication:

> [W]e observe a potential inconsistency between advising a defendant of the right to remain silent as part of the *Miranda* warnings and using any subsequent refusal to answer [pedigree] questions as evidence of uncooperativeness and, ultimately, of intoxication. The privilege against self-incrimination embraced within the right to remain silent is fundamental. *Using that silence to prove lack of cooperation, if appropriately raised, is clearly prohibited.*

Whitson v. State, 863 S.W.2d 794, 799 (Ark. 1993) (Citing *Doyle v. Ohio*, 426 U.S. 610) (emphasis added).

Since County Court found no *Doyle* error due to this petitioner's use of statements/swearing to relay his desire to remain silent, it never decided if *Doyle* forbade the State from using such post-*Miranda* warning pedigree questioning silence. Yet the court, in dicta, cited a New York case to suggest that a conflict of decisions existed as to whether a State can make evidentiary use of an arrestee's post-*Miranda* warning pedigree questioning silence. (App., *infra*, 12a-13a).

The Court below was wrong. In *Fletcher v. Weir*, 455 U.S. 603 (1982), this Court held *Doyle* inapposite to "post-arrest," pre-*Miranda* warning silence. *Id.* at 607. Thus, the holding of *People v. Johnson*, 253 A.D.2d 702 (N.Y. App. Div. 1998), i.e. that the State's use of defendant's "post-arrest refusal to answer administrative pedigree questions" did not violate any of his constitutional rights, *Id.* at 703, was in accord with this Court's decision in *Fletcher*. Indeed, the *Johnson* court had at least implicitly indicated that *Miranda* warnings did not in fact precede the refusal there. "Routine pedigree questioning serves important administrative purposes, and warnings pursuant to *Miranda v. Arizona* (384 US 436) are not required." *Johnson*, 253 A.D.2d at 703.

Prior to the pedigree questioning done here, the arresting officer had properly told this petitioner of his "right to remain

silent, to refuse to answer *any* questions." (A-662). Indeed, and "[u]nder Miranda, a person in police custody has, of course, an absolute right to decline to answer *any* question, incriminating or innocuous...." *United States v. Mandujano*, 425 U.S. 564, 580-581 (1976) (emphasis added). As a result, this petitioner had enjoyed an absolute right to remain silent in response to both pedigree questions asked – and even if his truthful answers would not have been incriminating.

Hence regardless of the sufficiency of petitioner's self-incrimination argument (see, *supra*, at pp. 22-25), the State had improperly used his refusals to answer the two pedigree questions asked: the "*Doyle* analysis rests on the Due Process Clause, not the Fifth Amendment." *Wainwright v. Greenfield*, 474 U.S. 284, 293 n10 (1986). Indeed, and when compared to this Court's two prior decisions in *Doyle* and *Greenfield*, "there are no significant facts which distinguish this case." *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981).

Until this Court decides to overrule *Miranda*, or at least modify it so as to require the police to warn all suspects that the right to remain silent is not available during pedigree questioning, any State's evidentiary use of a suspect's post-*Miranda* warning pedigree silence must be held to violate the Due Process Clause of the Fourteenth Amendment.

C. THIS COURT SHOULD RESOLVE THE VERY IMPORTANT ISSUE REGARDING WHETHER A SUSPECT'S POST-*MIRANDA* WARNING REFUSAL TO SIGN A FALSE FINGERPRINT CARD IS CONSIDERED PROTECTED SILENCE UNDER *DOYLE*.

The State, before trial, twice admitted that the police only wanted this petitioner to sign the false fingerprint card to get an incriminating confession of his oral refusal to let the officer fingerprint him. (A-384, ¶20; A-328). Therefore, this Court should hold that such a post-*Miranda* warning refusal to sign constitutes protected silence under *Doyle v. Ohio*.

III. THE INSTANT CASE PRESENTS THE MOST EGREGIOUS *DOYLE* ERROR EVER CALLED TO THE ATTENTION OF THIS COURT.

In the seminal case *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court reversed the convictions of two separately tried defendants' after the State had used their post-*Miranda* warning silence during cross-examination for impeachment, and again during closing arguments. *Id.* at 613-615, 614 n.5.

In the only other decision by this Court to reverse a State conviction based on *Doyle*, the prosecutor used defendant's post-*Miranda* warning silence during its case in chief and, like *Doyle*, during closing arguments. See *Wainwright v. Greenfield*, 474 U.S. 284, 286-288, 287 n2 (1986). Therein, this Court pointed out: "At the outset, we note that, in this case, unlike *Doyle* and its progeny, the silence was used as affirmative proof in the case in chief, not as impeachment." *Id.* at 292. "The constitutional violation might thus be ***especially egregious*** because, unlike *Doyle*, there was no risk 'that exclusion of the evidence [would] merely provide a shield for perjury.'" *Id.* at 292 n8 (all emphasis added) (quoting *Doyle*, 426 U.S. at 626 (STEVENS, J., dissenting)).

Here, the State not only used this petitioner's post-*Miranda* warning silence during its case in chief, and closing arguments, but during its opening statements as well. (see, *supra*, at pp. 5-10). Thus, this case presents a due process error even more egregious than *Doyle/Greenfield* combined.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Dated: February 12, 2007
Elmira, New York

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STATE OF NEW YORK

COUNTY COURT COUNTY OF CHEMUNG

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

DECISION & ORDER
JC #2518

JOHN M. PRONTI,

Defendant-Appellant.

CHEMUNG
SUPREME & COUNTY
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BEFORE: HON. PETER C. BUCKLEY

APPENDIX A

Buckley, J.

This matter is before the court on the appeal of John M. Pronti from a verdict and sentence rendered against him in Horseheads Village Court for Failure to Maintain a Designated Lane, Driving While Intoxicated and Obstructing Governmental Administration in the Second Degree.

This Court has reviewed the transcripts, motions, evidence and appellate briefs of the parties. On July 7, 2004, Horseheads Village Police Officer Charles Patterson observed the defendant driving on the wrong side of the road and pulled him over. When Officer Patterson determined that the defendant had failed roadside sobriety tests, he placed the defendant under arrest and brought him to the Elmira Heights Police Station, where the defendant agreed to submit to a DataMaster test of his blood-alcohol concentration.

Officer Steven Pickering attempted twice to administer the DataMaster test to the defendant, but the defendant first stopped blowing into the tube, then blew around the tube by failing to form a tight seal around it with his mouth. As a result, Officer Pickering determined that the defendant had refused to take the test.

Following his refusal to submit to the DataMaster test, the defendant was handcuffed to the wall at the police station and asked several pedigree questions. He replied by swearing and saying that he would not provide the information.

The defendant's handcuff was removed in order to obtain fingerprints. He stated he would not consent to fingerprinting and first refused to sign the blank fingerprint cards then placed his hands in his pockets. Officer Patterson tried to remove the defendant's hands from his pockets in order to obtain the fingerprints, but gave up and returned him to his chair.

The defendant's assignment of error that will be addressed in this decision can be summarized as follows. First, he argues that the trial court erred in denying his motion to dismiss under C.P.L. 30.30 for failure to afford him a speedy trial. Second, the defendant claims that the trial court erroneously admitted evidence of his refusal to submit to a breath test of his blood alcohol content. Third, he argues that the trial court erred in admitting evidence of his conduct at the police station. Fourth, defendant claims that the trial court erred in consolidating his trial for Driving While Intoxicated with his trial for Obstruction of Governmental Administration. Fifth, the defendant argues that the trial court erred in convicting him of Obstructing Governmental Administration because most of the actions comprising the charge were permissible.

Adjournments granted to allow defendant to file pretrial motions are excludable under C.P.L. 30.30, as are adjournments requested by defense counsel.

The defendant argues that because the People did not declare readiness for trial until 160 days[1] after his initial indictment on charges of Obstructing Government Administration, his case should have been dismissed. The sixth amendment of the United States Constitution guarantees criminal defendants the right to a speedy trial. A speedy trial in New York State must conform to the requirements of C.P.L. 30.30, which sets how soon after the commencement of an action the People must declare readiness for trial. C.P.L. 30.30(1)(b) applies to the instant case because the defendant was "accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months...

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[1]The court agrees with the defendant's calculation of 160 days between the initial arraignment and the People's valid declaration of trial readiness and sees no reason to recite the relevant law here.

" C.P.L. 30.30(1)(b). Accordingly the People were required to be ready for trial within 90 chargeable days. Id. In determining whether the defendant's right to a speedy trial was violated by the 160 day period between initial arraignment and the People's readiness, two periods, a 42 day delay from July 14 to August 25, 2004 and a 43 day delay from October 19 to December 1, 2004 are dispositive.

The first delay was triggered when, at a pretrial appearance the court asked the defendant if he intended to file pretrial motions. When the defendant answered in the affirmative and further indicated that he was studying for the bar exam, a 42 day adjournment was granted. (A 549) The defendant argues that because he was not advised of his rights under C.P.L. 30.30 and the consequences of an adjournment on his right to a speedy trial, this delay must be chargeable to the People. The error that the defendant makes in this argument is to assume that this adjournment should be analyzed under 30.30(4)(b). 30.30(4)(b) does, in fact, require that a pro se defendant be advised of his speedy trial rights in order to effectively waive them by consenting to a delay that falls under that section. However, 30.30(4)(a) is the section under which this first delay should be analyzed, as this is where the code addresses "a reasonable period of delay resulting from other proceedings concerning the defendant, including...pre-trial motions." This section makes no mention, as does 30.30(4)(b) of any requirement of warning of the effects of waiver to the pro se defendant. All of defendant's case law is therefore inapposite as none of it addresses delays for pre-trial motions by the defense. 30.30(4)(a) could be no more clear in categorically excluding adjournments which are granted to allow the defense to file pre-trial motions, regardless of whether or not the delay is requested or speedy trial rights are expressly waived.

Nonetheless, defendant contends that his statement that he would be filing pretrial motions should not have been considered a request for an adjournment. In support of his

argument that a statement is not a request, defendant cites People v. Knapp, 164 Misc.2d 216. In that case, the defense stated a date by which a blood test could be completed and an adjournment was granted until that date. Id. at 218. There, the adjournment was held to be chargeable to the People because the defense's statement was not a request for an adjournment Id. at 222, note 8. In Knapp, however, the adjournment was granted because the accusatory instrument appeared facially defective, failing to identify the "controlled substance" that was the subject of the complaint. Id. at 217. When the defense pointed out this issue, an adjournment was granted so that a blood test could be performed. Id. at 218. These facts are clearly distinguishable from the case at bar where the purpose of the adjournment was to allow the defendant to file pretrial motions. As a result, the proper analysis is under 30.30(4)(a), and it is simply irrelevant whether the defendant requested the adjournment. Because the adjournment was ordered exclusively for the defendant to file motions and study for the bar, the time is excludable.

An adjournment from October 19th to December 1, 2004 was granted at the request of defense counsel. Under 30.30(4)(b), these 43 days are excludable because they constitute a "period of delay resulting from a continuance granted by the court at the request of...the defendant or his counsel." Because the first of the two adjournments discussed was granted for the defendant to file pretrial motions and the second was specifically requested by his counsel, neither period is chargeable to the people. The total of these days is 85, which, when subtracted from the 160 days between the original charge and the People's valid assertion of readiness, brings the total prereadiness time chargeable to the people to 75 days or less. As a result, the trial court properly denied the defendant's 30.30 motion.

Issues of fact may be raised by open court denials of allegations contained in pleading papers.

In his affidavit in support of his omnibus motion, dated August 25th, 2004, the defendant denied the allegations against him and alleged facts. Among the facts alleged, defendant claimed that he had sought and been denied the advice of counsel. (A 73-76). The defendant claimed that one of the reasons that he wanted to contact a lawyer was to help him decide whether to submit to the chemical test. (A 73). He contends that because the prosecution did not respond in writing to these contentions, all the facts he alleged must be considered admitted. In support of this proposition, defendant cites People v. Gruden, 42 N.Y.2d 214, 216 (1977) in which the Court of Appeals stated that "[n]ormally what is not disputed is deemed to be admitted." The defendant correctly argues that where a party fails to contest the factual allegations of its opponent, no factual dispute has been raised.

Further, defendant points out the holding in Gruden that "a motion *may* be decided without a hearing unless the papers submitted raise a factual dispute" Id. at 215 (emphasis added). Although Gruden related to a 30.30 motion to dismiss, it was intended to apply to "nearly every pretrial and posttrial motion made in a criminal action." Id. at 216. Thus Gruden directed that a court may decide motions without a hearing where the papers do not raise an issue of fact. Defendant therefore argues that it was error for the trial court to withhold judgment on motions until the hearing because the papers themselves did not raise an issue of fact. This court can not agree.

People v. Dean, 45 N.Y.2d 651, clarify and limited the holding in Gruden, by indicating that an open court denial is sufficient to create a factual dispute. In Dean, the People, opposing a 30.30 motion to dismiss, alleged in court that they had long been ready for trial. Id. at 656. While the

defendant argues that Dean is applicable only were there have been no responsive papers, the language of the decision does not indicate this. Rather, Dean *expressly* distinguished Gruden by noting that in Gruden "the people did not dispute the facts alleged in the defendant's motion papers." Dean, 45 N.Y.2d at 656, quoting Gruden 42 N.Y.2d at 215. The distinction, and therefore the reason for a different outcome, was the People's open court denial. Dean should therefore be ready as a counterpoint to Gruden to indicate that where, as here, a defendant, by motion, makes allegations in motions, an open court denial by the people is sufficient to create an issue of fact.[2] In the instant case, the people did offer testimony in open court which contradicted the defendant's allegations. At the probable cause hearing on October 19, 2004, Officer Patterson denied defendant's assertion that he had requested to speak to an attorney while he was being arrested and processed. (A 188-189). Because there was an open court denial of the defendant's allegations, application of Dean leads to the conclusion that an issue of fact was properly raised.

However, the defendant argues that People v. Min Chi Ma, 161 Misc.2d 542 is comparable to the case at bar, because there, as here, the people consented to a hearing in response to the defendant's motions, and in that filing did not contest the defendant's specific allegations. Id. at 543. The People then contested the defendant's allegations in open court. Id. at 544. In Min Chi Ma, the People's open court denial was deemed insufficient to raise an issue of fact. Id. at 544. However, unlike in the case at bar, in Min Chi Ma, the open court opposition to the defendant's allegations

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[2]The trial court was technically incorrect when it held that the defendant's new factual allegations created a factual dispute (A 285), as there was no denial of these facts alleged by the defendant until the October 19, 2004 hearing. It was at this hearing, when the prosecution witnesses denied the defendant's allegations, that a factual dispute was raised.

consisted of a claim by the prosecutor "inmost general fashion...that there was no violation of constitutional rights," and "this was done only after the adequacy of the opposition papers was ruled on by the court in chambers...." Id. at 544. Min Chi Ma, therefore, merely followed Gruden in holding that where the facts alleged by the defendant in motions remain undenied by the prosecution they will be deemed admitted. In the instant case, as noted above, the prosecution offered specific denials of the defendant's factual allegations. This court's analysis of the above cases indicates that while according to Gruden a court may decide a motion on the pleadings, a sufficiently specific open court denial of allegations contained in moving papers may properly raise an issue of fact. It was therefore not error for the trial court to deny a summary grant of defendant's motion to suppress.

Further, as the prosecution points out, the language of C.P.L. 710.60(1) indicates that response to a suppression motion is voluntary: "The people may file...an answer denying or admitting any or all of the allegations of the moving papers." This would be odd drafting indeed if it was intended to indicate that should the people opt not to respond to the defendant's moving papers they would be conceding all of the allegations made by the defendant in those papers. Rather, it indicates the clear legislative intent, supported by the subsequent subsections, that where the factual allegations are not contested in the moving papers, a hearing pursuant to subsection 4 is the proper venue for findings of fact.

Had defendant requested an attorney before submitting to a breath test, he would have been entitled to one, but whether such a request was made is a factual matter which is not before this court.

Defendant is correct that he had the right to speak to an attorney before deciding whether to submit to the breath test. People v. Gursey, 22 N.Y.2d 224, 227-228 (1968). However, when a defendant does not request to speak to an attorney

before taking a sobriety test, he has effectively waived that right. People v. Shaw, 72 N.Y.2d 1032, 1033-34. Once the people make a showing of the legality of police conduct, the burden is on the defendant to show *at the suppression hearing* that he was denied the right to counsel. People v. Dejac, 187 Misc.2d 287, 291. As discussed above, when the people created an issue of fact by denying the defendant's allegation, the issue of whether the defendant had sought and been denied counsel was properly before the trial court for fact finding. The trial court committed no error, therefore, in weighing the defendant's allegations in his moving papers against the People's open court denials and determining that the defendant had not sought counsel and was therefore not denied the right to speak to an attorney before deciding whether to submit to a breath test.

Where a defendant's behavior unequivocally evidences a refusal to submit to a chemical test, evidence of the working order of the machine is not a necessary element of proof of such refusal.

The defendant assigns as error the trial court's ruling that in the case of a refusal to submit to a breath test of alcohol content in the blood, the people do not have the burden of proving that the machine was in working order. (A 286) At the suppression hearing, the people showed that the defendant failed to seal his lips around the tube and that the machine did not make the noises that would indicate a sample consistently flowing into the machine. (A 38-39, 78-82). The people did not offer testimony as to the working order of the machine at the suppression hearing, but did at trial. (A 756) The trial court was correct that evidence of a refusal does not require the same proof of the instrument's accuracy as would be required if the prosecution sought to introduce test results. People v. Adler, 145 A.D.2d 943, 944. The issue remaining, then, is what if any proof of the

working order of the machine must be presented in an allegation of a refusal to submit to a breath test.

The defendant's argument that the people must offer proof of the working order the machine is largely based on the fact that Adler, supra puts a burden on the prosecution of proving that the breathalyzer's "failure to register a sample is the result of the defendant's action and not of the machine's inability to register a sample." Id. at 944. This standard was clarified by People v. Davis, 8 Misc.3d 158, 164, in which the court stated that "where a defendant pretends to blow into the machine, but deliberately diverts his breath in order to prevent the machine from registering a reading, he will be deemed to have refused to take the test." The prosecution in the case at bar put forth evidence of a refusal identical to that described in Davis. (A 38-39, 78-82). As a result, a finding that the defendant refused to submit to the test based on his conduct is proper.

Nonetheless, defendant correctly points out that evidence of the working order of the machine is frequently an element of sufficient proof of refusal. E.g. People v. Bratcher, 165 A.D.2d 906, 907; Van Sickle v. Melton, 64 A.D.2d 846. The defendant, in citing to these cases, confuses necessity with sufficiency. In Bratcher, for example, the defendant's refusal to breathe into the machine coupled with a showing that the machine was in good working order was sufficient to justify a finding of refusal. Bratcher, 165 A.D.2d at 907. This is logically distinguishable from the proposition advanced by the defendant, that such a showing is a necessary element of proof of refusal. Indeed, where he machine fails to read a sufficient sample and the defendant is plainly seen to be attempting to defeat the machine, the prosecution's burden of showing a refusal is met. Davis, 8 Misc.3d at 164.

The defendant failed to put any significant doubt on the convincing testimony of the officers that he refused to properly submit to the breath test. He offered no evidence of any defect in the machine, and brought no evidence in open

court that he had properly submitted to the test. As a result, his arguments do not negate the fact that the trial court, in suppression hearings and the jury, at the trial, properly had before them the question of whether the defendant refused to submit to the breath test. The defendant did little if anything to contradict the prosecution's evidence, and instead sought to rely on procedural maneuvers in attempting to prevent the prosecution from proving its assertions.

Because no evidence of the condition of the machine is necessary where the defendant's conduct clearly evidences a refusal, the trial court correctly denied suppression of the chemical test refusal.

Defendant's responses to pedigree questions were admissible.

The defendant assigns as constitutional error the admission of evidence of his responses to routine booking questions. A review of the videotape of the defendant taken at the police department on the night of his arrest indicates that when he was asked routing pedigree questions, he refused to answer them and instead cursed repeatedly. The defendant terms this conduct "silence" and argues that had he given accurate answers to pedigree questions, they would have incriminated him by showing that he lied when he told Officer Patterson, at the scene of the traffic stop, that he was going home. He further argues that because the police knew his address from his driver's license and a printout from the Division of Criminal Justice Services, they only asked him these routine booking questions in order to force him to incriminate himself.

The test of whether pedigree questioning is exempted from Miranda is not whether the police already had the information they requested or whether the responses might be incriminating, but whether they are intended "to secure the biographical data necessary to complete booking or pretrial services." Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990)

(distinguishing, creating exception to Miranda v. Arizona, 384 U.S. 436 (1966)).[3] Where these questions "*appear* reasonably related to the police's administrative concerns" (emphasis added) they fall outside of the protections of Miranda and answers are therefore not subject to suppression. Id. at 601-602. In spite of the defendant's arguments to the contrary, the record shows no evidence of a conscious attempt by the police to trick the defendant into incriminating himself. Rather, the record plainly and unequivocally demonstrates that Officer Patterson asked the defendant routine booking questions for administrative purposes. Moreover, information on a driver's license need not be presumed accurate because people move from time to time and do not always immediately change the address on their driver's licenses. Therefore, contrary to the defendant's argument, the questions put to the defendant appear to be reasonable and natural elements of the booking process and the court thus rejects defendant's argument that an address on a driver's license or printout is a bar to oral questioning by the police as an element of routine booking procedure.

Nonetheless, the defendant argues that evidence of his silence in response to properly posed routine booking questions was not admissible. This question has not been settled. Illinois v. Lackland, 248 Ill. App.3d 426, 434 held that where an already Mirandized defendant remained silent in the face of routine pedigree questioning, such silence was inadmissible. In citing to Doyle v. Ohio, 426 U.S. 610, the court in Lackland implicitly reasoned that a defendant might otherwise be lulled by the Miranda warning into conduct later determined to be incriminating. Contrary to Lackland,

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[3]Of course, should the police ask the same pedigree question over and over again in an apparent attempt to browbeat a suspect, this fact might be indicative of a police action which is not administrative. The record here simply does not support the defendant's contention that the police conducted such a practice in his case.

the Appellate Division of the First Department of New York State, in People v. Johnson, 253 A.D.2d 702, 703 held that evidence of a refusal to answer questions which fall within the pedigree exception is admissible because the questioning does not violate the defendant's constitutional rights.

In the instant case, however, the question of whether silence in response to routine booking questions is admissible is an academic one. The court in Lackland, as in several other cases cited by defendant, clearly indicated that the defendant was *silent*. Lackland, 248 Ill. App3d at 434. Here, of course, the defendant was not silent, and the prosecution did not indicate that he was silent. Rather, it was videotaped evidence of his profanity in response to the police questioning that was incriminating. "Responses to routine booking questions–pedigree questions, as we have referred to them–are not suppressible even obtained in violation of *Miranda*...." People v. Rodney, 85 N.Y.2d 289, 293 (1995). Therefore, while evidence of silence in response to pedigree questioning may be inadmissible under Miranda, evidence of swearing and other uncooperative conduct in response to the same questions is admissible. As a result, there was no error in the trial court's admission of evidence of defendant's statements and behavior at the police station.

The defendant was not entitled to 710.30 notice of statements which fell within the pedigree exception to Miranda.

As discussed above, the statements made by the defendant in response to pedigree questions were admissible because they fell within an exception to Miranda. In Rodney, 85 N.Y.2d at 294, the court held that where police questioning falls within the pedigree exception to Miranda, no notice is required of statements given in response. Id. In that case, the defendant, when asked by a police officer what he did for a living, "kind of smiled.. and said I'm in sales." Id. at 291. Testimony of this statement was both

incriminating and admissible in the defendant's trial for Criminal Sale of a Controlled Substance and Criminal Possession of a Controlled Substance. Id. Rodney holds quite clearly that where pedigree questioning meets the Muniz test of being "reasonably related to...administrative concerns" no notice of statements made in response to these questions is required. Id. at 293. This is because where statements fall within the pedigree exception, the "defendant lacks a constitutional basis on which to challenge the voluntariness of his statement and where there is no question of voluntariness, the people are not required to serve defendant with notice." Id. at 293.

In the case at bar, because Miranda was not implicated by the defendant's responses to the pedigree questions, no notice was required. The defendant's argument against the applicability of Rodney fails for the same reasons that it failed to distinguish Rodney in terms of Miranda questioning. The defendant's accusations and speculations are unsupported in that while *he* may have known that responses would be incriminating, he has failed to prove or even offer any persuasive evidence that the officers deliberately sought to incriminate him. As a result, he may have had the right to remain silent in response to the pedigree questioning (and such silence may have been inadmissible), but his incriminating responses are not protected and he was not entitled to notice that they would be used.

Because 710.30 notices were not required for the statements and videotapes which defendant sought to preclude, defendant's arguments about the timeliness of these notices need not be considered.

Consolidation of a simplified information with a long form information for jury trial is proper.

The defendant correctly notes that C.P.L. 100.45(1), in applying the rules of consolidation set out in C.P.L. 200.20, makes no mention of simplified informations. As a result, the

defendant argues, it was reversible error for the trial court to consolidate the charge of Driving While Intoxicated (charged by simplified information) with the charge of Obstruction of Governmental Administration (charged by long form information). While the legislature does appear to have omitted consolidation of short form informations either with other short form informations or with long form informations, there is no conceivable legislative purpose for such an omission. In fact, the goal of judicial economy, clearly sought by the passage of this statute would be confounded by the construction urged by the defendant. This court therefore favors and agrees with the interpretation of the trial court permitting consolidation.

Nonetheless, while a literal reading of C.P.L. 100.45(1) might not provide for consolidation of short form informations, a literal reading of C.P.L. 200.20 allows this consolidation expressly. Indeed, if statutes must be construed so as to invoke not their intent but rather their strictest construction, we would find that C.P.L. 200.20, titled: "Indictment; what offenses may be charged; joinder of offenses and consolidation of indictments" specifically states that "[t]wo offenses are enjoyable when...[e]ven though based upon different criminal transactions... proof of the first offense would be material and admissible as evidence in chief upon a trial of the second...." C.P.L. 200.20(2)(b). A colon after the word "indictment" in the title might have forced the court to read the title to indicate that the entire section refers to indictments, but the semicolon merely separates terms, not specifying their formal relationship. Thus, reading the statute literally, C.P.L. 100.45 becomes largely redundant as C.P.L. 200.20(2)(b) permits joinder of any offense for which evidence of one is admissible in a trial of the other. For the reasons discussed above, there was no evidence in support of either of the two main charges which would have been inadmissible in a trial of the other.

Even had it been error to consolidate the trials, the court finds that all of the defendant's arguments of prejudice are unavailing or based on misunderstandings of the law which have been discussed earlier (for example, the admission of evidence which the defendant contends was not properly noticed under C.P.L. 710.30).

Evidence of defendant's refusal by force to provide his fingerprints is legally sufficient to sustain a charge of Obstructing Governmental Administration

The defendant argues that much of his conduct that made up the evidence in support of the charge of Obstructing Governmental Administration in the Second Degree was permissible. This class A misdemeanor is defined in P.L. 195.05 as being committed when a person "prevents or attempts to prevent a public servant performing an official function, by means of intimidation, physical force or interference...." The defendant in this case refused to provide his fingerprints, and instead stuck his hands in his pockets and refused to remove them.[4] A refusal by force to submit to fingerprinting is a sufficient basis for a charge of Obstructing Governmental Administration. People v. Santos, 182 Misc.2d 764, 771. Santos held that because an officer is required under C.P.L. 160.10 to take fingerprints of a suspect, fingerprinting meets the definition of an official function under P.L. 195.05. Id. at 770. Therefore, "the defendant affirmatively resisted the officer's attempt to fingerprint her and these actions on her part clearly constitute physical force as well as physically interfering with the officer's attempt to perform an official function." Id. at 771. A physical refusal to submit to fingerprinting, as exhibited by the defendant in the case at bar, constitutes a basis for a charge of Obstructing Governmental Administration.

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[4]Defendant's contention that this action was intended to prevent his signature from being taken by force merits no discussion.

Because the affirmative resistance to fingerprinting constitutes a legally sufficient basis for the charge, and because the video tape did not show the actual event, there was no error in allowing the jury to see the tape of the defendant's behavior before and after the attempted fingerprinting. Defendant's statements and behavior, in challenging and swearing at the police and making unsolicited comments did not constitute an effective invocation of his right to remain silent and were therefore admissible, and the court finds no reason why the jury should not have been exposed to them. This evidence would assist the jury in determining the nature of the defendant's conduct while off camera, and was therefore both admissible and relevant.

The court has considered defendant's other arguments and finds them to be without merit.

The verdict and sentence rendered by the jury and the Village court are upheld.

This constitutes the opinion, decision and order of the court.

Dated: August 8, 2006

s/ PETER C. BUCKLEY
PETER C. BUCKLEY
J.C.C.

STATE OF NEW YORK
COUNTY OF CHEMUNG
COURT JUSTICE
VILLAGE OF HORSEHEADS

VILLAGE OF HORSEHEADS
SEAL
COUNTY OF CHEMUNG, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

JOHN M. PRONTI Defendant(s)
06/02/75

Certificate of Disposition
Docket 04070026
D/A : 07/07/04

I certify that the above named defendant having appeared before this Court charged with the offense(s) of Driving While Intoxicated, Deviating from a direct course, Obstructing Governmental Administration *in violation of section(s)* 1192-3, 1128c *of the* Vehicle & Traffic *Law of the* 195.05 Penal *State of New York, and a proper request for official statement of disposition having been received, this is to certify that the charge(s) aforesaid were, on the* 18th *day of* March, 2005, *disposed of by:* Convicted after trial (jury) of all charges *and that the defendant was sentenced:* 7/13/05

VTL 1192-3: $800 fine, $190 surcharge, license revocation 6 mos
VTL 1128c: Conditional discharge, $55 surcharge
PL 195.05: 90 days, $165 surcharge

s/ Janette Zeigler
~~Judge~~ / Clerk

*Case remains open: $1,210.00 due plus suspension fees $70.
NOTE: A copy of the request should be filed with this certificate in the court's records of the case.

CAUTION: This information must not be divulged where a seal order under CPL § 160.50 has issued or where the defendant has been adjudicated a youthful offender.

Copies should be sent to the following: _ Court, √ Defendant, _ Agency, _ District Attorney

APPENDIX B

State of New York
Court of Appeals

BEFORE: HON. VICTORIA A. GRAFFEO,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

CERTIFICATE DENYING LEAVE

JOHN M. PRONTI,

Appellant.

I, VICTORIA A. GRAFFEO, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to section 460.20 of the Criminal Procedure Law and upon the record and proceedings herein, * there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: November 16th, 2006
At Albany, New York

s/ Victoria A. Graffeo
Associate Judge

* Decision and order of the Chemung County Court, dated August 8, 2006, affirming a judgment of the Horseheads Village Court.

APPENDIX C

N.Y. Veh. & Traf. Law §1192(3) (Consol. 2004) provides:

> Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.

N.Y. Veh. & Traf. Law §1193(1)(b) (Consol. 2004) provides:

> Driving while intoxicated or while ability impaired by drugs; misdemeanor offenses. A violation of subdivision two, three or four of section eleven hundred ninety-two of this article shall be a misdemeanor and shall be punishable by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in a penitentiary or county jail for not more than one year, or by both such fine and imprisonment.

N.Y. Penal Law §70.15(1) (Consol. 2004) provides in part:

> Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed one year....

N.Y. Penal Law §195.05 (Consol. 2004) provides in part:

> A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act....
>
> Obstructing governmental administration is a class A misdemeanor.

APPENDIX D